

## **PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

Members of the public may submit written comments on draft advisory opinions.

DRAFT C of ADVISORY OPINION 2011-28 is now available for comment. It was requested by Dan Backer, Esq., on behalf of Western Representation PAC, and is scheduled to be considered by the Commission at its public meeting on February 2, 2012.

If you wish to comment on DRAFT C of ADVISORY OPINION 2011-28, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on February 1, 2012.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

## **REQUESTOR APPEARANCES BEFORE THE COMMISSION**

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

**Under the program:**

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).**
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email ([Secretary@fec.gov](mailto:Secretary@fec.gov)), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.**
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.**
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.**

**FOR FURTHER INFORMATION**

Press inquiries: Judith Ingram  
Press Officer  
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth  
(202) 694-1040

Comment Submission Procedure: Kevin Deeley  
Acting Associate General Counsel  
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2011-28, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

**ADDRESSES**

Office of the Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Office of General Counsel  
ATTN: Kevin Deeley, Esq.  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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2012 JAN 27 P 3:00

January 27, 2012 **AGENDA ITEM**

For the Meeting of 2/2/12

MEMORANDUM

**SUBMITTED LATE**

TO: The Commission

FROM: Anthony Herman *AH*  
General Counsel

Kevin Deeley *KR for KD*  
Acting Associate General Counsel

Robert M. Knop *NES RMK*  
Assistant General Counsel

Tony Buckley *NES for TB*  
Attorney

Subject: Draft C of AO 2011-28 (Western Representation PAC)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for February 2, 2012.

Attachment

1 ADVISORY OPINION 2011-28

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3  
4

5 Dan Backer, Esq.  
6 DB Capitol Strategies  
7 209 Pennsylvania Avenue, SE  
8 Suite 2109  
9 Washington, D.C. 20003

**DRAFT C**

10

11 Dear Mr. Backer:

12 We are responding to your advisory opinion request on behalf of Western  
13 Representation PAC (the "Committee"), concerning the application of the Federal  
14 Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to  
15 the Committee's reporting obligations for independent expenditures to be made to place  
16 advertisements on Facebook during the 2012 Presidential primary elections. The  
17 Commission concludes that the Committee may not exclude the actual costs of  
18 independent expenditure advertisements placed on Facebook from the calculation of its  
19 expenses included on its 24-hour and 48-hour reports. Further, the Commission  
20 concludes that the Committee must attribute these costs to the various States' Presidential  
21 primary elections when reporting the monthly cost of its independent expenditure  
22 advertisements placed on Facebook on its regular monthly reports.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letter received on  
25 November 21, 2011, your emails received on December 6 and 13, 2011, telephone  
26 conversations with the Office of General Counsel on December 2, 6, and 13, 2011, your

1 comment filed on January 18, 2012, and your representations at the Commission's Open  
2 Meeting on January 19, 2012.

3 The Committee is a nonconnected committee. It plans to place advertisements on  
4 Facebook in connection with the 2012 Republican Presidential primary elections. These  
5 advertisements will expressly advocate the election or defeat of a clearly identified  
6 Federal candidate and will constitute independent expenditures. The Committee  
7 currently plans to run only ads that do not reference a specific Presidential primary  
8 election and are not geographically targeted to a particular state.

9 The Committee will budget \$2,000 per day for these advertisements. Although  
10 the Committee may not spend this amount every day, the Committee asks the  
11 Commission to assume that the Committee will spend a maximum of \$2,000 per day.

12 The Committee seeks to exclude the costs of placing its advertisements on  
13 Facebook from its 24-hour and 48-hour reports of independent expenditures. The  
14 Committee also seeks to avoid attributing the costs of placing these advertisements to  
15 various States' Presidential preference primary elections on its monthly reports. The  
16 Committee claims that meeting these obligations "constitutes a significant legal  
17 encumbrance upon [the Committee's] First Amendment rights," in that it will require it to  
18 determine, for every advertisement placed: 1) the State primary elections to which the ad  
19 applies; 2) whether that advertisement falls within that particular primary election's 24-  
20 or 48-hour reporting period; and 3) the cost of placing each individual advertisement.

21 ***Questions Presented***

22 1. *May the Committee exclude the cost of placing each independent*  
23 *expenditure advertisement on Facebook from the calculation of costs included in its 24-*

1 *and 48-hour reports, provided such cost is included in the Committee's regular monthly*  
2 *reports?*

3 2. *May the Committee report the actual monthly costs of its independent*  
4 *expenditure advertisement on Facebook on its regular monthly reports without*  
5 *attributing these costs to the various States' Presidential primary elections?*

6 ***Legal Analysis and Conclusions***

7 1. *May the Committee exclude the cost of placing each independent*  
8 *expenditure advertisement on Facebook from the calculation of costs included in its 24-*  
9 *and 48-hour reports, provided such cost is included in the Committee's regular monthly*  
10 *reports?*

11 No, the Committee may not exclude the actual costs of independent expenditure  
12 advertisements placed on Facebook from the calculation of its expenses included on its  
13 24-hour and 48-hour reports.

14 An "independent expenditure" is an expenditure by a person expressly advocating  
15 the election or defeat of a clearly identified candidate that is not made in concert or  
16 cooperation with or at the request or suggestion of, among others, the candidate.  
17 2 U.S.C. 431(17)(A) and (B); 11 CFR 100.16(a).

18 Under the Act and Commission regulations, a political committee that makes  
19 independent expenditures aggregating \$1,000 or more after the 20<sup>th</sup> day, but more than 24  
20 hours, before the date of a given election, must file a report describing the expenditures  
21 within 24 hours. 2 U.S.C. 434(g)(1)(A); 11 CFR 104.4(c). The 24-hour filing period  
22 begins when the independent expenditure is publicly distributed or otherwise publicly  
23 disseminated. 11 CFR 104.4(c). Reports must be filed by 11:59 p.m. of the day

1 following the date on which an advertisement is publicly disseminated. *Id.* Additional  
2 reports must be filed within 24 hours each time the political committee makes  
3 independent expenditures aggregating \$1,000 or more with respect to the same election  
4 as that to which the initial report relates. 2 U.S.C. 434(g)(1)(B); 11 CFR 104.4(c).

5 A political committee that makes independent expenditures aggregating \$10,000  
6 or more at any time up to and including the 20<sup>th</sup> day before the date of a given election  
7 must file a report describing the expenditures within 48 hours. 2 U.S.C. 434(g)(2)(A);  
8 11 CFR 104.4(b)(2). The 48-hour reporting period begins when the independent  
9 expenditure is publicly distributed or otherwise publicly disseminated. 11 CFR  
10 104.4(b)(2). Reports must be filed by 11:59 p.m. of the second day following the date on  
11 which an advertisement is publicly disseminated. *Id.* Additional reports must be filed  
12 within 48 hours each time the political committee makes additional independent  
13 expenditures aggregating \$10,000 or more with respect to the same election as that to  
14 which the initial report relates. 2 U.S.C. 434(g)(2)(B); 11 CFR 104.4(b)(2).

15 Independent expenditures are aggregated with respect to a given election  
16 regardless of which candidate is identified in the communication. 11 CFR 104.4(a),  
17 (b)(1)-(2), and (c); *see* Advisory Opinion 2003-40 (Navy Veterans) (concluding that two  
18 separate advertisements for the same election, one favoring Candidate A (costing \$9,000)  
19 and the other favoring Candidate B (costing \$4,000), had to be aggregated for purposes of  
20 filing a 48-hour report because the advertisements were related to the same election); *see*  
21 *also* Explanation and Justification, Bipartisan Campaign Reform Act of 2002 Reporting;  
22 Coordinated and Independent Expenditures, 68 FR 404, 406 (January 3, 2003). For  
23 purposes of aggregating independent expenditures, each State's Presidential primary



1 election is considered a separate election. *See* Advisory Opinion 2003-40 (Navy  
2 Veterans).

3       The treasurer of a political committee “shall keep an account of . . . the name and  
4 address of every person to whom any disbursement is made, the date, amount and  
5 purpose of the disbursement, and the name of the candidate and the office sought by the  
6 candidate, if any, for whom the disbursement was made. . . .” 2 U.S.C. 432(c)(5); *see*  
7 *also* 11 CFR 102.9(b)(1)(i)-(iv). In performing recordkeeping duties, the treasurer must  
8 use his or her best efforts to obtain, maintain and submit the required information.  
9 2 U.S.C. 432(i); 11 CFR 102.9(d).

10       Under the circumstances described in your request, the calculation for  
11 advertisements that do not reference or target a specific election is the following: The  
12 Committee would divide the cost of placing each advertisement by the number of  
13 upcoming primary elections.<sup>1</sup> For example, an advertisement for which the Committee  
14 paid \$2,000 that was placed before the first primary election of the cycle would relate to  
15 all subsequent presidential primary elections.<sup>2</sup> And the cost of this advertisement would  
16 be \$2,000, divided by the total number of primary elections for that cycle. After a

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<sup>1</sup> As noted above, each State’s Presidential primary election is considered a separate election for purposes of aggregating independent expenditures.

<sup>2</sup> Commission regulations explain that a primary election is one of the specific types of elections which is included within the definition of “election.” 11 CFR 100.6(b). A list of the 2012 Presidential primary elections may be found at <http://www.fec.gov/pubrec/fe2012/2012dates.pdf>. A caucus or convention of a political party is an election only if it “has authority to select a nominee.” 11 CFR 100.6(d). *See also* AO 1979-71 (PASPAC).

1 presidential primary election has occurred, no further advertising costs are attributable to  
2 that election for that cycle.<sup>3</sup>

3 Facebook charges its advertisers once per calendar day for each advertisement.<sup>4</sup>  
4 Thus, for example, an advertisement running on February 5, 2012 will be billed at the end  
5 of that day regardless the number of hours it was accessible on that day. In the case of a  
6 24-hour report, the Commission will have at least one full day to determine that it has  
7 reached the \$1,000 threshold and to file the report. Accordingly, because the statutory  
8 obligation to file 24- and 48-hour reports includes these types of advertisements placed  
9 on Facebook, the Commission concludes that the Commission is required to file such  
10 reports as set forth in the Act and the Commission's regulations.<sup>5</sup>

11 In a comment filed on January 18, 2012, you state that the Commission may not  
12 know the actual cost of particular Facebook advertisements until after the filing deadline  
13 has passed. The proper method for handling such a situation is spelled out on the  
14 Commission's website.<sup>6</sup> In the event the Commission does not know the actual cost of an

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<sup>3</sup> In Advisory Opinion 1995-44 (Forbes for President), the Commission concluded that the statute did not require a Presidential candidate's principal campaign committee to file 48-hour notifications of contributions received. Advisory Opinion 1995-44 (Forbes for President) recognizes that the 48-hour notification requirement is intended to apply to contributions received just before an election that can be used for that election. When presidential primary elections follow one another in rapid succession, it can be difficult to attribute numerous contributions received to a particular primary election particularly when those contributions may be used to pay expenses not tied to any particular State or that benefit the campaign nationally and the Commission declined to interpret the statutory reporting obligation in a way that would lead to an arbitrary result. In contrast, here, it is neither difficult nor especially burdensome to attribute an equal amount to each subsequent election.

<sup>4</sup> See <http://www.facebook.com/help/?page=121272714621547> (last accessed December 20, 2011).

<sup>5</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding independent expenditure reporting requirements); see also *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (upholding reporting requirements for electioneering communications).

<sup>6</sup> See <http://www.fec.gov/rad/pacn/FederalElectionCommission-RAD-PACs.shtml#ie2> (last accessed January 24, 2012).

1 advertisement, prior to the filing deadline, it should estimate the cost and, if, based on  
2 that estimate, a report is required, indicate that the reported amount is an estimate.  
3 Thereafter, once the Committee receives information regarding the actual cost of the  
4 advertisement, and if the actual cost differs from the estimate, the Committee should  
5 report the correct amount on the Committee's next regular report and reference the earlier  
6 estimate. Provided that the Committee makes a reasonable, good faith effort to estimate  
7 accurately the costs of the Facebook advertisement, following this procedure will be  
8 deemed "best efforts" by the Committee to meet its independent expenditure reporting  
9 obligations. 2 U.S.C. 432(i); 11 CFR 104.7(a).

10 2. *May the Committee report the actual monthly costs of its independent*  
11 *expenditure advertisements on Facebook on its regular monthly reports without*  
12 *attributing these costs to the various States' Presidential primary elections?*

13 No, the Committee may not report the actual monthly costs of its independent  
14 expenditure advertisements on Facebook on its regular monthly reports without  
15 attributing these costs to the various States' Presidential primary elections.

16 Every political committee must file reports of its receipts and disbursements.  
17 2 U.S.C. 434(a)(1); 11 CFR 104.1(a). Nonconnected committees shall file either  
18 quarterly reports, or monthly reports which shall be filed no later than the 20<sup>th</sup> day after  
19 the last day of the month. See 2 U.S.C. 434(a)(4)(B); 11 CFR 104.5(c)(3).  
20 Nonconnected committees must disclose their independent expenditures on their monthly  
21 or quarterly reports. 2 U.S.C. 434(b)(4)(H)(iii); 11 CFR 104.3(b)(3)(vii). These reports  
22 must disclose all independent expenditures aggregating less than \$10,000 with respect to

1 a given election any time during the calendar year up to and including the 20<sup>th</sup> day before  
2 an election. 11 CFR 104.4(b)(1).

3 As noted above, for purposes of aggregating independent expenditures, each  
4 State's Presidential primary election is considered a separate election. *See* Advisory  
5 Opinion 2003-40 (Navy Veterans). The Committee will file monthly reports in 2012.

6 The examples and calculations set forth above demonstrate how the Committee  
7 must determine its costs for placing independent expenditure advertisements on Facebook  
8 with respect to the various States' primary elections. Once the Committee has done so, it  
9 must aggregate costs for each State's Presidential primary election during the reporting  
10 period and list the States and amounts per State on Form 3X, Schedule E. Because the  
11 Committee does not have to file its monthly report until the 20<sup>th</sup> day after the last day of  
12 the month, it has sufficient time to aggregate its costs and report them to the Commission,  
13 as required by the statute.

14 This response constitutes an advisory opinion concerning the application of the  
15 Act and Commission regulations to the specific transaction or activity set forth in your  
16 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
17 of the facts or assumptions presented, and such facts or assumptions are material to a  
18 conclusion presented in this advisory opinion, then the requestor may not rely on that  
19 conclusion as support for its proposed activity. Any person involved in any specific  
20 transaction or activity which is indistinguishable in all its material aspects from the  
21 transaction or activity with respect to which this advisory opinion is rendered may rely on  
22 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or

1 conclusions in this advisory opinion may be affected by subsequent developments in the  
2 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.  
3 The cited advisory opinions are available on the Commission's website, [www.fec.gov](http://www.fec.gov), or  
4 directly from the Commission's Advisory Opinion searchable database at  
5 <http://www.fec.gov/searchao>.

6 On behalf of the Commission,

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Caroline C. Hunter  
Chair